Wagner Distribution Services, Inc. d/b/a Distribution Services West *and* General Warehousemen, Local No. 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 21-CA-19491

July 9, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On December 10, 1981, Administrative Law Judge Timothy D. Nelson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We adopt the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(5) and (1) of the Act by withdrawing recognition from the Union without establishing a good-faith doubt based on objective considerations of the Union's majority status. In so doing, however, we do not pass on his comment, which is unnecessary to the resolution of this case, that resignations from union membership may constitute an objective consideration supportive of a good-faith doubt. Chairman Van de Water does not join his colleagues in their disposition of the issue of resignations from union membership. Rather, in accordance with the Administrative Law Judge's comment in fn. 31 of his Decision, the Chairman believes that the matter of resignations is a factor to be considered in determining whether an employer has a good-faith doubt of a union's majority status.

In view of the Administrative Law Judge's discrediting of Respondent's president, Thayer, that supervisors reported to him that a majority of employees no longer wanted to be represented by the Union, Member Hunter finds it unnecessary to decide whether such reports by supervisors, if made, would be sufficient in themselves to constitute a valid objective consideration.

Further, in adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the shift schedules at its Brea facility, we agree with his finding that any request for bargaining by the Union over such changes would have been futile. We therefore find it unnecessary to rely on his additional discussion as to whether the Union received sufficient notice of the intended change to trigger an obligation to demand bargaining over the matter.

Member Hunter, in adopting the Administrative Law Judge's reliance on *Pennco, Inc.*, 250 NLRB 716 (1980), notes that the Administrative Law Judge cited that case for the limited purpose of describing an employer's heavy burden of producing evidence of objective considerations in support of an asserted good-faith doubt of a union's majority status. Member Hunter therefore finds it unnecessary here to express a position with regard to any other aspects of the Board's decision in that case.

[3] In par. 1(c) of his recommended Order, the Administrative Law Judge uses the broad cease-and-desist language, "in any other manner." However, we have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have concluded that a broad remedial order is inappropriate. See, e.g., *Western Truck Services, Inc.*, 252 NLRB 688 (1980); *Douglas & Lomason Company*, 253 NLRB 277 (1980). Accordingly, we shall modify the recommended Order so as to use the narrow injunctive language, "in any like or related manner."

We also shall modify par. 2(a) of the Administrative Law Judge's recommended Order to provide that Respondent shall recognize and bargain with the Union upon request.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wagner Distribution Services, Inc. d/b/a Distribution Services West, Anaheim, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Upon request, recognize and bargain with the Union as the exclusive collective-bargaining representative of all employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives employees the right to form, join, or assist labor unions, to bargain collectively with their employers through representatives selected by a majority of them, to engage in other group activities for their mutual aid and protection on the job, and to refrain from any or all of those activities except where there is a lawful contract requiring that employees become or remain members of a union representing them after a certain grace period.

WE WILL NOT refuse to recognize or bargain collectively in good faith with General Warehousemen, Local No. 598, International

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of our employees in this unit:

All production and maintenance employees, warehouse employees, including shipping and receiving clerks and janitors, employed by us at our Anaheim and Brea facilities; excluding office employees, professional employees, and supervisors as defined in the Act.

WE WILL NOT make changes, such as shift schedule changes, in the established wages, hours of work, or other terms and conditions of employment of employees in the unit without first notifying the Union about our intentions and giving it a reasonable opportunity to bargain about such changes.

WE WILL NOT question employees about whether or not they support the Union or about the union sympathies of fellow employees.

WE WILL NOT ask employees to circulate antiunion petitions among their fellow employees.

WE WILL NOT sponsor antiunion activities such as asking employees to sign antiunion form letters which we have prepared.

WE WILL NOT create the impression that we are keeping our employees' union activities under surveillance.

WE WILL NOT directly or by implication promise employees that they will be considered for promotion in order to influence their choice whether or not to sign an antiunion statement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by the Act.

WE WILL, upon request, recognize and bargain with the Union as the exclusive collective-bargaining representative of all employees in the unit described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL immediately cancel the schedules for the day and swing shifts at our Brea facility which we established on September 8, 1980, and WE WILL restore and maintain the schedules for those shifts which were in effect immediately before that date unless and until we have notified the Union and given it a reasonable opportunity to bargain in good faith with us about any further changes.

WAGNER DISTRIBUTION SERVICES, INC. D/B/A DISTRIBUTION SERVICES WEST

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge: On August 29, 1980,[1] and October 1, General Warehousemen, Local No. 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), filed, respectively, original and amended unfair labor practice charges against Wagner Distribution Services, Inc. (Respondent),[2] with the Regional Director for Region 21 of the National Labor Relations Board (the Board). After an investigation, the Regional Director issued a complaint and notice of hearing on October 30 against Respondent, and an amended complaint and notice of hearing on January 7, 1981.[3]

Respondent duly answered, denying wrongdoing.

I heard the matter in a hearing in Orange, California, on July 22 and 23, 1981. The complaint and Respondent's answer thereto were both amended at the hearing resulting in a further narrowing of the issues for litigation.

Issues

The issues presented are:

1. Did Respondent and the Union reach full agreement on or about August 26 on the terms for a collective-bargaining agreement to replace one which had expired earlier?

2. Did Respondent, in late August, unlawfully sponsor an effort to decertify the Union, incidentally using unlawful promises and interrogations?

3. Did Respondent, as of August 27, have a good-faith doubt based on objective considerations that the Union continued to represent a majority of its employees?

4. Did Respondent unilaterally change shift schedules at one of its facilities without first notifying the Union and affording it a reasonable opportunity to bargain about the change?

All parties appeared through counsel at the hearing and filed post-trial briefs, which I have carefully considered. Upon the entire record,[4] I make these:

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[1] All dates are in 1980, unless otherwise specified.

[2] Respondent's name appears as it was amended at the hearing by stipulation of the parties.

[3] The complaint, as amended, alleges, in substance, that Respondent violated Sec. 8(a)(5) of the Act on or about August 27 by refusing to execute a previously agreed-upon labor agreement, by then and thereafter refusing to recognize and bargain with the Union, and by unilaterally changing swing shift hours at one of its facilities. It further alleges, in substance, that Respondent began an unlawful campaign in late August involving sponsorship of an effort to have employees decertify the Union, using unlawful promises, and interrogations—all in violation of Sec. 8(a)(1) of the Act.

[4] I grant the General Counsel's unopposed motion to correct the transcript.

FINDINGS OF FACT

I. PRELIMINARY CONCLUSIONS

A. *Background*

Respondent, a California corporation, provides public warehousing and distribution services from facilities in Anaheim (the Cerritos facility) and Brea, California.[5] It had been bound to a 3-year labor agreement with the Union covering a unit (described below in my conclusions of law) at its two facilities. That agreement expired on February 28.

B. *Overview of the Bargaining for a Successor Agreement and the Eventual Collapse of the Bargaining Relationship*

There were five formal negotiating sessions for a successor agreement during the period January 31–May 27. During this period, no overall agreement was reached; and there had been an impasse between the parties as to certain key issues since February 28.

On August 26, following a lengthy hiatus in formal bargaining, there was a brief telephone exchange between representatives of the Union and Respondent. The Union and the General Counsel contend that an overall "deal" was concluded in that conversation which was to be confirmed in writing in a followup meeting at Respondent's offices on August 27. While Respondent vigorously disputes this claim, everyone agrees that there was a meeting on August 27 during which Respondent admittedly refused to have any further dealings with the Union, claiming that the Union no longer represented a majority of its employees in the bargaining unit.

C. *Summary of Bargaining Events Between January 31 and August 27*

On *January 31*, the Union's business agent and negotiator, Jerry Stephens, met at Respondent's Anaheim offices with Respondent's president, Larry Thayer, its operations manager, Neal Klingaman, and its attorney, Kenneth Ristau. The Union, through Stephens, presented Respondent with a written set of proposed changes to the former labor agreement. Although the parties were together for about an hour, nothing of substance was discussed. Near the end of the meeting, Respondent, through Ristau, told the Union that Respondent would prepare a written set of counterproposals for submission at the next meeting, which the parties mutually scheduled for February 19.

On *February 19*, the same persons met, excepting only attorney Ristau, at the same place. Respondent presented the Union with its written counterproposals.

A comparison of the respective proposals of the parties reveals substantial areas of disagreement, both in typical "economic" areas (e.g., hourly wage rates, benefit contribution amounts, and number of paid holidays) and in non-"cost" areas (e.g., scope of employee transfer and job bid rights, scope of "management's rights" clause, scope of no-strike clause, scope of "picket line" clause, scope of discharge and disciplinary warning clause, and scope of "grievance-arbitration clause). In presenting management's proposals, Thayer explained that Respondent needed many language changes and a lower "cost" package to compete effectively in Orange County. Stephens asserted that the Union's proposed language appeared in its "Los Angeles Warehouse" contract covering several employers in Los Angeles County who had been able to "survive" with the same language.

Crediting Stephens' uncontradicted recollection, there was specific discussion among the participants on both sides over Respondent's more restrictive proposals in the area of "picket line" language, disciplinary language, and job bidding language. The meeting ended without specific agreement on any aspects of the two proposals which were before the parties at that time.

On *February 28*, the parties met again at Respondent's Anaheim offices. The same persons were present as at the February 19 meeting, with the addition of attorney Ristau. Acting on instructions from the Union's secretary-treasurer, Stephens reiterated the Union's position that the Union could not vary from language in the old agreement which was "beneficial to the employees," adding that he did not have "authority" to modify any of the existing language. Ristau stated that Respondent's proposed language changes in job bidding, discipline, and picket line clauses were of particular importance to his principals.[6] Stephens repeated that he could not deviate from the existing picket line language. Stephens agreed shortly after with Ristau's statement that the parties were at "impasse."

There was then an interlude during which Respondent prepared a notice to its employees indicating that it was implementing certain of its "last offer" wage and benefit proposals, including an upward modification from Respondent's earlier written wage offer, and other changes reflecting Respondent's acquiescence in the Union's proposals for an additional paid holiday, for a pension contribution increase, and for an improved health care plan. A copy of this notice was then given to Stephens, together with Respondent's expressed intention to implement its "last offer." The meeting ended without further substantive discussion.[7]

[5] In the representative year before the complaint issued, Respondent performed services valued in excess of $50,000 for other California firms each of which, in turn, purchased and received goods valued in excess of $50,000 directly from suppliers outside California.

[6] Stephens later testified that either during the February 28 meeting or the subsequent March 19 meeting Ristau said to him that Respondent "would drop the 90-day probationary period and any other proposals that he made if we could get an agreement on the . . . bidding and the disciplinary action and the picket line clause." Ristau did not testify. No other witness presented by Respondent was invited to contradict Stephens' testimony in this regard. Accordingly, although it is highly summary in character, I nevertheless credit Stephens that Ristau made the quoted remark. Moreover, inasmuch as the subsequent March 19 bargaining session was conducted through a mediator, without face-to-face exchanges between the parties, I conclude that Ristau made the quoted remarks in the February 28 session—most likely at or about the point that Ristau was emphasizing the importance of the three "language" areas referred to above.

[7] The complaint does not challenge Respondent's last-minute upward revisions from its earlier written proposals, as reflected in its "last offer."

On *March 19*, the parties convened at Ristau's law offices in Newport Beach. Burt Walters, a mediator from the Federal Mediation and Conciliation Service (FMCS) had been brought in. The parties never bargained face-to-face during this meeting. Rather, Walters shuttled back and forth between the parties' separate caucus rooms, seeking each party's view as to what had caused the impasse and focusing his discussions with each party on what he evidently believed were clearly identified areas of disagreement.

I received evidence about the mediator's communications for its nonhearsay aspects only, specifically "as a possible operative fact which might inform my interpretation of anything that the Union did after receiving that communication." The General Counsel expressly disclaimed "any other purpose" in offering evidence about what the mediator told (or implied to) the Union about Respondent's bargaining position, or vice versa.[8] It may be that out-of-court statements of FMCS mediators have special reliability insofar as they purport to reflect what bargaining parties told the mediator—it being the essence of the mediator's function reliably and disinterestedly to report to one party what the other party has said (at least when he/she is authorized to do so). Moreover, the refusal to compel testimony by FMCS mediators in Board proceedings about what one party or the other has said during a mediated bargaining session (see, e.g., *N.L.R.B.* v. *Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980)) presents unique problems to a bargaining party seeking to show, as herein, that "movement" occurred during a mediated session. This suggests an additional basis for receiving testimony about what the mediator indicated to one party about the other's position as proof that the other party actually took the position indicated by the mediator. These considerations are purely hypothetical in this proceeding, however, since the evidence about what the mediator said was offered and received solely for the limited purpose set forth above.

With the *caveat* noted above, I set forth below the parties' respectively reports of what happened in the March 19 session.

According to Thayer, mediator Walters asked Respondent's representatives what were the "primary issues" which had caused the impasse. Thayer stated that Ristau replied that "there were a number of issues that the Company had placed in its proposal that were not resolved, but . . . the primary issues and those which could not be resolved and that resulted in the impasse were the picket line language, the disciplinary language, and the lateral bidding." Mediator Walters then left Respondent's caucus.

Next, according to Stephens, Walters entered the Union's caucus and asked Stephens "how important the . . . bidding language was and the disciplinary language. And also . . . about the monetary benefits that had been implemented." Stephens stated that he told Walters "that we would agree to the . . . bidding and their disciplinary language, and their monetary implement, if we could work out something on the picket line clause we would agree to what they wanted." Walters then left the Union's caucus.

According to Thayer, Walters stated during one of his return visits to the management caucus[9] that "he believed that those [i.e., 'the primary issues' earlier identified by Ristau to Walters] were at this stage the primary issues." Walters also told Thayer that "insofar as the picket line language was concerned, he saw . . . that there was no way they [i.e., the Union] could move on that language." Thayer expressly denied that Walters ever communicated specifically to Respondent that the Union was prepared to give in on other outstanding "cost" and "language" issues if only Respondent would agree to the Union's desired "picket line" language.

It is undisputed that Walters then suggested that the parties break off negotiations for a "cooling off" period. The meeting then closed.

On *May 27* the parties met again at Ristau's law offices, with mediator Walters again present, again going between separate caucus locations in an effort to achieve movement on the subject of the disputed "picket line" language. When neither party expressed a willingness to move from its previously stated position regarding the "picket line" issue, Walters convened the parties briefly to express his view that the parties were still at impasse (without identifying any areas in which he perceived agreement had been reached).

The meeting then closed.

D. *Events on August 26 and 27*

Matters remained in this posture, without further communications between the parties, until August 26. As of that point, according to Stephens, the Union believed that the only outstanding point of disagreement between the bargaining parties was on what "picket line" language should be in the contract—all other areas of dispute having been resolved, either explicitly or implicitly. Specifically, Stephens assumed that FMCS mediator Walters had earlier communicated to Respondent the Union's willingness to accept Respondent's wage and benefit package and its "bidding" and "disciplinary" language changes, and Stephens further assumed from Ristau's remarks at the February 28 meeting (discussed above in fn. 5) that the other language changes which Respondent had initially proposed had been abandoned (or would be if the Union would acquiesce fully in the areas of "bidding," "discipline," and "picket line" language).

Stephens stated that he obtained the approval of the Union's secretary-treasurer at some point after May 27 to give in on the "picket line" language issue in order to conclude an agreement. Having obtained that authorization from his superior, Stephens telephoned Thayer at Respondent's offices on August 26, between 9 and 9:30 a.m. This, in substance, is Stephens' version of what was said in that conversation:

> I asked Mr. Thayer what outstanding issues we had left in order to get this contract resolved. He said as

[8] See also colloquy in which the General Counsel and the Charging Party are given the opportunity to expand the proffer of the mediator's statements to include their hearsay contents and they decline to do so.

[9] Thayer's version was somewhat conclusionary in tone and was imprecise about the sequence of events. Stephens' version suffered similarly.

far as he knew the only thing left was the picket line clause.

* * * * *

I told Mr. Thayer that I would like to meet with him on it the following day. And he said, "Well, what is the reason of the meeting?" I said, "the union will agree to your picket line language." And he said, "We have a deal." I asked to meet him at 10:00 o'clock. He said he could not meet at 10:00 o'clock, but he could meet me at 9:00 o'clock.

* * * * *

I told him I would see him the following day . . . .

* * * * *

He said, "We have a deal." I said "Fine, I will be there tomorrow and we will get this wrapped up and signed off."

This, in substance, is Thayer's version of the same telephone conversation:

Mr. Stephens asked if he could come down and see me the next day.

* * * * *

And I said, "Well, I don't know what about, but you sure can come down and see me." He says, "Well, I want to talk about the contract." I said, "Okay . . . we have been at impasse for months. I don't know what there is to discuss. But if you want to come down, come down." He indicated that he wanted to come down at 10:00 o'clock, and I told him that no, I could not meet him at 10:00, but I would be glad to do so at 9:00 o'clock.

* * * * *

He said okay, he would be there.

There are less dramatic differences between the respective accounts of Thayer and Stephens about what happened when they met on August 27 in Thayer's office at 9 a.m. Stephens recalled, in substance, that he entered the meeting, saying, "Well, let's get this thing out of the way, Larry," and that Thayer promptly replied, "There is nothing I can do about it," explaining that "Some of your good union members have signed a petition for decertification." According to Stephens, Thayer added, "I can't sign anything. It is out of my hands."

Thayer's version is that Stephens entered the meeting saying that "he would like to discuss the contract and see if we couldn't get it all wrapped up" to which Thayer responded that he was "sorry, but at that point in time the matter was out of my hands, and that I was in no position to discuss nor sign a contract." Thayer stated that he then told Stephens that "a petition had been filed with the National Labor Relations Board, that I believe that the majority of the employees no longer wanted 598 to represent them, and that they were asking for an election to determine that fact."

E. *Conclusions as to Respondent's Alleged Agreement on August 26 To Enter Into a Successor Contract*

It is evident from the foregoing that a major issue in the case—whether the parties concluded agreement on a successor labor contract in the conversation between Stephens and Thayer on August 26—depends for resolution on whose version of the August 26 exchange is credited. If Stephens is believed, then I may conclude that Thayer's statement, "We have a deal," is reflective of a meeting of the minds required for the formation of an effective collective-bargaining agreement.[10] If Thayer is believed, however, the General Counsel's case must certainly fall in this regard since the only inference to be drawn from Thayer's version is that the parties had not yet resolved differences on critical "language" items (most notably, the "picket line" clause) and the Union had not yet even communicated its willingness to accede to Respondent's already implemented wage and benefit package. Thus, if Thayer is credited, there was still more bargaining to do as of the close of the telephone conversation on August 26; and all parties agree that no such bargaining took place thereafter—Respondent having refused on August 27 to bargain further based on a claimed doubt as to the Union's continuing status as the representative of the employees in the bargaining unit.

After careful observation of Thayer and Stephens as they testified, and after a full review of the entire record, I do not credit Stephens. Demeanoral considerations are, at best, only marginally influential in this conclusion. Stephens displayed frailities of memory at certain points, and his testimony was conclusionary in tone, particulary regarding the bargaining history leading to the August 26 telephone exchange. He nonetheless testified with apparent conviction and in considerable detail about the critical August 26 conversation. Similar comments may be made about Thayer's testimony, however. Moreover, the testimony of both witnesses regarding the August 26 exchange indicated to me that each was fully aware of the legal significance of this conversation and each displayed a predictable tendency to shape his recollection to suit the desired legal result.[11] Because the testimonial failings just described were shared in substantially equal measure by both witnesses, I would not rely on those factors in resolving the central credibility question against Stephens. Rather, I simply do not find it probable, considering the record as a whole, that the issue or issues which had divided the parties for months would be resolved through the kind of glib telephonic exchange reported by Stephens.

[10] Just exactly what the "deal" was is a separate and more difficult question—although not necessarily an insuperable one, given my findings regarding the essentially undisputed history of the bargaining which preceded August 26.

[11] Particularly noteworthy in this regard is Stephens' supplemental recollection—after he had already purported to describe the entire conversation with Thayer—that Thayer said a *second* time: "We have a deal." I regard this much, at least, as self-serving embellishment, unreflective of any genuine recollection on Stephens' part.

In the first place, even assuming that Stephens had been told by his superiors that he could capitulate on the "picket line" language if that would produce a new agreement, I find it improbable that he would do so during a brief telephone conversation—his first contact in several months with Respondent's principals. Rather, I deem it more likely that he would use the telephone exchange, at most, to verify with Thayer his belief that the "picket line" clause was the only obstacle to agreement and, having established that, would then suggest a meeting to see if that matter could be resolved. Put another way, I would expect an experienced negotiator to withhold his playing of that final card until he had exhausted the possibility of obtaining some more favorable "compromise" on "picket line" language.[12]

Thus, while I credit Stephens' claim that he was prepared to capitulate on the outstanding "picket line" issue, I doubt that he would have done so without first meeting face-to-face with Respondent to determine whether some compromises in that area were possible.

Entirely apart from the foregoing consideration, however, I am even more persuaded that Thayer would never have made any statement to the effect, "We have a deal," over the telephone or that he would have otherwise so readily indicated a willingness to conclude a pact without first reviewing the matter with his attorney. The record reflects that attorney Ristau had played a leading role in speaking for Respondent throughout the negotiations. To accept Stephens' testimony is to assume that Thayer found no need for legal counsel in the concluding of a labor agreement even though he had relied heavily on such counsel in the prior negotiations.

Finally, based on findings and conclusions below it is apparent that, as of August 26, Respondent was actively seeking a means to terminate its bargaining relationship with the Union.[13] Indeed, my findings below demonstrate that Stephens' telephone call to Thayer on the morning of August 26 triggered a flurry of activity on Respondent's part to obtain sufficient employee signatures on a management-prepared antiunion statement to justify the filing of a petition for an election to oust the Union. It would require ignoring that evidence of Respondent's desire to terminate the bargaining relationship to conclude that Thayer was nevertheless prepared to strike a "deal" with the Union which would preclude any possibility of bringing that desire to fruition.

I therefore reach these ultimate findings bearing on Respondent's alleged acceptance of a successor labor agreement on August 26. Stephens was doubtless correct in assuming that the only issue of substance dividing the parties as of the final mediation session on May 27 was the "picket line" clause. Whether or not mediator Walters ever expressly communicated to Respondent the Union's willingness to concede on all disputed points save for the picket line language, it was implicit in Walters' presentation on May 27 that this was the key to reaching an agreement; and Respondent must have drawn the same conclusion from that presentation. It is therefore very likely that, but for certain later changes in Respondent's willingess to continue recognition of the Union, the parties would have concluded an agreement on May 27 if the Union had capitulated on the picket line language. By August 26, however, Respondent had persuaded itself that it could escape any bargaining relationship whatsoever with the Union. Accordingly, when Stephens called Thayer on August 26 to suggest a further meeting, I infer that Thayer correctly sensed that the Union was about to capitulate, and that this would leave Respondent in a position where it would be hard pressed to justify a refusal to enter into a successor agreement. Thus, I find, Stephens did no more on August 26 than to suggest a meeting and Thayer did no more than to indicate a willingess to meet with the Union. And, as may be seen from findings below, Thayer immediately took steps which he hoped would perfect a claim that the Union had lost majority support in the bargaining unit, and which would justify a complete suspension of the bargaining process unless and until the Union were able to demonstrate anew that it was the majority representative.[14]

I therefore recommend dismissal of that portion of the complaint which alleges that Respondent violated Section 8(a)(5) of the Act by reneging on an alleged agreement on August 26 to enter into a successor labor contract.

II. RESPONDENT'S CONDUCT IN LATE AUGUST; ALLEGED COERCIVE POLLING OF EMPLOYEES AND RELATED SECTION 8(A)(1) ALLEGATIONS; THE FILING OF THE "RM" PETITION

At 10:34 on the morning of August 27, Respondent filed a representation election petition with the Regional Office, docketed as Case 21-RM-2057.[15] It was signed by Respondent's trial counsel herein, who is associated in practice with attorney Ristau.

Such a petition is the normal procedural device by which an employer who possesses a good-faith doubt based on objective considerations that an incumbent union no longer represents a majority of its employees in an established bargaining unit may obtain a Board-sponsored election to resolve the representation question.

Considering the preparation, clerical, and travel time inherent in filing such an instrument in downtown Los Angeles by 10:34 a.m., it is apparent that Respondent had set the process in motion at least several hours earlier—and, more likely, on the preceding day, August 26. This is consistent with the undisputed fact that Thayer made reference to a "decertification" petition which had already been "filed" during his 9 a.m. meeting with Stephens on August 27.[16] It is further consistent with the findings below.

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[12] To that point, the Union had not offered any midground language proposals, but had adamantly refused to budge from the preexisting language in the contract pertaining to picket line observances by employees.

[13] Especially the findings regarding exchanges between employee Madding and Supervisor Gramstadt in the week before August 26.

[14] I have fully considered all of the arguments advanced by the General Counsel and the Union which suggest that the "probabilities" favor a conclusion contrary to the one I have reached. I find them unpersuasive.

[15] The finding as to the precise timing of the filing is based on the official time stamp appearing on the reverse side of that RM petition (G.C. Exh. 11).

[16] Although the terminology used by Thayer to Stephens implied that employees themselves had begun a "decertification" process, it is clear

Continued

Several employee witnesses called by the General Counsel testified, in substance, that they were approached by various supervisors on or shortly before August 26 and were asked to become associated with an effort to oust the Union. None of this testimony was contradicted and I credit it. Specifically, I find as follows:

A. *Gramstadt-Madding Incidents*

On a date which employee Carol Madding was unable to identify except as occurring in the "third week in August," Madding was approached by Supervisor Jim Gramstadt.[17] Gramstadt told Madding that Thayer wanted "to get this contract dispute settled" and asked Madding what she "thought about changing the Union or getting in another local or getting our own Union, our own company union." Madding commented that this might "expedite things, because nothing was happening the way it was." Gramstadt then asked Madding to "talk to the other guys about it and see what they thought." Madding agreed to do so. Gramstadt asked Madding if she would "circulate a petition" if one were "made up" which could be "sent to the NLRB . . . to take a vote . . . ." She said that she "didn't know," but would "talk to the guys and see if they would sign it."

Later in the same week, Gramstadt again approached Madding and asked if she had "talked to the other guys about the petition." She replied that she had but "they didn't seem too interested." Gramstadt commented that he "wasn't supposed to be out there talking . . . about it, because he was management, and it was against the law for management to be talking to Union people about changing the Union."

Still later, but before August 26, there was a similar exchange, described by Madding only as a "rehash" of the same things referred to in the earlier conversations.

Still later, in the "late afternoon" of August 26, Gramstadt summoned Madding to his office, closed the door, and presented her with a form letter, admittedly prepared on Respondent's stationery by Thayer, which was preaddressed to Thayer, and contained this text:

> As an employee of Wagner Distribution Services, I do not believe that Teamsters Local 598 has provided good representation for all the employees.
>
> I have discussed this with most of the other employees and believe that a majority no longer want Local 598 to represent them.
>
> Sincerely
> [space for signature left blank]

Gramstadt asked Madding if she would sign the form. She asked him how many others had signed it. He replied that "eight from Brea had signed it and four from Cerritos had signed it." Madding then signed the form and Gramstadt put it in an envelope, assuring her that no one would see who signed it, including Thayer, and that it would be "sent to the NLRB."[18]

B. *Klingaman-Cunningham Form-Signing Incident*

Operations Manager Neal Klingaman summoned employee Allan Cunningham to his office on, I find, August 26.[19] There, Klingaman presented Cunningham with another form identical to the one previously quoted (hereafter "the form") and handed Cunningham a pen, inviting him to sign the form. Klingaman told Cunningham that he was not obliged to sign it and that "nothing would happen" if he did not sign. Klingaman also said that the form would be used in connection with "decertification" of the Union and that "it would be up to the National Labor Relations Board." Cunningham signed the form.

C. *Skinner-Roland Form-Signing Incident*

On August 26[20] between 4:30 and 5 p.m., Supervisor Skinner approached employee John Roland and handed him the form in an envelope, saying that it was "to take a vote for the Union." He also said that he "would like" for Roland to sign it, but that he would walk away while Roland read it and that Roland could do what he wanted with it. Roland signed the form and handed it back to Skinner.

D. *Ives-Hixon Form-Signing Incident*

Also on the afternoon of August 26, Supervisor John Ives spoke with employee Philip Hixon. Ives spoke briefly with Hixon about a desire on the part of an unspecified "they" to "get together with Union officials and Mr. Thayer and all of the employees of Wagner's and discuss some way of possibly trying to settle the contract, or work out something." Ives then left the area and returned shortly afterward with a copy of the form. Ives told Hixon that "a dozen or so people had signed this . . . and . . . if we would sign this . . . that we could all get together and discuss everything, you know, openly, and, you know, see if we could come to some type of an agreement." Pressed by a leading question from the General Counsel, Hixon also recalled (and I find, absent any denial) that Ives also said during this discussion that "they were looking for a supervisor, and [Hixon] would be a good man for it, and you know, that he was going to have a talk with his superiors about it."

Hixon signed the form.

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that the formal process itself was initiated solely by Respondent's management. No concurrent evidence of "objective considerations" which would support a "good faith doubt" on Respondent's part of the Union's majority status was submitted when it filed the RM petition. Neither was any such evidence submitted subsequently. Rather, the processing of that petition was "blocked" by the filing on August 29 of the original charge herein. Respondent withdrew the RM petition in November, after being advised by the Regional Office that the Union's charges were deemed meritorious.

[17] The parties stipulated that Gramstadt was a supervisor within the meaning of Sec. 2(11) of the Act "at least, as of August 11" and thereafter.

[18] In fact, Thayer did receive and review all such signed forms and thus knew who had signed. In fact, the forms were not sent to the Board.

[19] Cunningham was unsure of the date. The form which he signed during his meeting with Klingaman bears the date August 26. Absent other evidence, I rely on the date appearing on the form.

[20] For the same reason discussed above in connection with Cunningham, the finding as to the date is based on the date appearing on the form Roland signed in connection with the incident next described.

E. *Skinner-Czerniewski Form-Signing Incident*

In midafternoon on August 26, Supervisor Tom Skinner approached employee Peter Czerniewski and handed him a copy of the form, saying that Czerniewski could either sign it or not—that it was up to him. As Czerniewski read the form, Skinner said that, if Czerniewski chose to sign it, "it would help the negotiations between the Company and the Union [and] if this didn't help, that we could bring in another local to negotiate. And, if that didn't work out, the people working there could negotiate directly with management." Czerniewski signed the form and gave it to Skinner. Skinner said that he "would like to keep this conversation private between him and [Czerniewski] alone."

F. *Other Forms Received by Respondent*

Thayer received a total of 15 signed antiunion forms.[21] I infer that all of the signatures resulted from supervisory solicitations, not only because of the pattern suggested by the foregoing evidence, but also because Thayer admitted that he devised the procedure, drafted the text used on the forms, and gave them to "supervisors" with instructions to "pass them out."

G. *Conclusions Regarding the Lawfulness of the Preparation and Circulation of Antiunion Forms and Related Behavior of Supervisors*

As a general proposition, it is deemed inherently coercive of employees' Section 7 rights and thus violative of Section 8(a)(1) of the Act for an employer to question employees about their union sympathies, particularly when the employer initiates antiunion petitions or statements and asks employees to subscribe to them. See, e.g., *Bancroft Manufacturing Co., Inc., et al.*, 189 NLRB 619, 629 (1971). A narrow exception to this general proscription has been carved out to permit employers, using appropriate safeguards, to poll employees to determine the truth of a union's claim of majority. Thus, in *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967), the Board stated the rule as follows (*id.* at 1063):

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

Respondent's circulation through supervisors of Thayer's forms does not satisfy the narrow *Struksnes* exception in a number of fundamental respects. The purpose of the forms was not to test the truth of a claim of majority support by the Union. Rather, the foregoing findings show that they were designed to provide evidence which Respondent could use to support a refusal to recognize the Union pending the conducting by the Board of a representation election—itself not available to Respondent unless it could provide objective evidence on which to support a claim that it entertained a good-faith doubt of the Union's majority status. As such, they were designed in such a way as to admit of no "pro-union" response. Moreover, the purpose of the forms was not clearly spelled out by the supervisors who solicited employee signatures. Thus, for example, in the cases of Hixon and Czerniewski, the credited evidence reveals that supervisors sought to leave the impression that signing the form could break the stalemate in negotiations with the Union or would "help the negotiations." In addition, in the case of Hixon, the solicitation of his signature was accompanied by an unmistakable suggestion that Hixon was under active consideration for a promotion—a blandishment which could be expected to influence Hixon's choice whether or not to sign. Finally, and perhaps most fundamentally, the entire process could not by any reasonable definition be characterized as involving a "poll" by "secret ballot." The forms themselves required a signature, and the response of each solicited employee was instantly known to the soliciting supervisor. Indeed, the lack of secrecy in the process was underscored in some instances by supervisors who expressly informed potential signers that specific numbers of employees at specific locations had "already signed."

For all of these reasons, the circulation of the forms was not privileged under *Struksnes*, but, rather, the process itself violated Section 8(a)(1) of the Act.[22]

I agree with the contentions of the General Counsel that, apart from the overall unlawful character of the process used to obtain signatures on the forms, certain solicitation instances involved independent violations of Section 8(a)(1). In this regard, I conclude that Gramstadt's pre-August 26 conversations with employee Madding involved unlawful interrogation about Madding's union sympathies and the sympathies of her fellow employees, and that his statement to her on August 26 that "eight from Brea . . . and four from Cerritos" had signed the forms unlawfully created the impression that employees' union activities were under surveillance (likewise, the similar statements of Ives to Hixon). Finally, I conclude that Ives' pointed comments to Hixon about Hixon's suitability for a supervisory opening amounted to an unlawful promise of benefits tending in the circumstances to coerce Hixon in the exercise of his Section 7 rights.

III. THE LAWFULNESS OF RESPONDENT'S ADMITTED REFUSAL TO RECOGNIZE AND BARGAIN WITH THE UNION AFTER AUGUST 26: THE QUESTION OF RESPONDENT'S "GOOD FAITH DOUBT"

Under established principles, the Union enjoyed a rebuttable presumption when the 1977–80 labor agreement expired that it continued to be the majority representative of the bargaining unit employees.[23] It is equally es-

[21] The parties stipulated that all but two of the forms bore dates of August 26. The other two forms bore dates of August 27 and September 4.

[22] See also *H. P. Wasson & Company*, 170 NLRB 293 (1968).

[23] See, e.g., *N.L.R.B.* v. *Cornell of California, Inc.*, 577 F.2d 513 (9th Cir. 1978), and cases cited at 515–516.

tablished that where, as herein, an employer refuses to bargain further with an incumbent union for a new contract based on a claim of doubt that the union continues to enjoy majority support the employer's actions are privileged only if it satisfies a burden of coming forward with evidence of "objective considerations" which justify its claim of doubt. (*Ibid.*) In *Pennco, Inc.*, 250 NLRB 716, 717 (1980), the Board stated, regarding the employer's rebuttal burden:

> . . . the employer's burden is a heavy one. Thus, "it is insufficient . . . that the employer merely intuits nonsupport," and good faith doubt "may not depend solely on unfounded speculation or a subjective state of mind."

My findings and conclusions above regarding the unlawful character of the solicitation of employee signatures on form letters prepared by Thayer preclude Respondent from relying on those letters as support for its claim of doubt. *H. P. Wasson & Co., supra.* Perhaps because it anticipated this legal result, Respondent has implicitly disclaimed reliance on those letters as providing a basis for a good-faith doubt and has, instead, insisted that it had a good-faith doubt based on objective considerations in "early August," following the alleged receipt by Thayer of numerous reports by supervisors and employees of substantial employee dissatisfaction with the Union.[24]

For reasons set forth next, I reject Respondent's fallback defense and conclude that Respondent violated Section 8(a)(5) and (1) of the Act by refusing, on and after August 27, to recognize the Union as the exclusive bargaining representative of its employees and to bargain in good faith with it for a successor labor agreement.

Even before addressing the factual merits of Respondent's claim that there were "objective considerations" by "early August" on which to base doubt of the Union's majority status, I conclude that Respondent did not, in fact, believe before August 26 that those "objective" facts existed. First, if they had been known to Respondent in "early August," Thayer would not have agreed on August 26 to meet further with Stephens on August 27 to continue collective-bargaining discussions. Second, Thayer would not have initiated the flurry of unlawful supervisory activity on the afternoon of August 26 to "create" an objective basis on which it could justify a refusal to bargain. Both factors strongly suggest that Respondent had, at best, a suspicion as of August 26 that there was disaffection for the Union among the employees—a suspicion that it felt able to confirm only through a coercive process of soliciting employees to subscribe to a management-prepared antiunion statement containing critical "magic words."[25]

All of the foregoing considerations lead me to view with disbelief any testimony by Thayer that he had anything more than a suspicion in "early August" that most of his employees no longer wanted to be represented by the Union.

Setting aside that threshold objection to Respondent's defense, I summarize below what Thayer stated, noting the areas which I deem to be particularly incredible.

Summarizing the evolution of his belief that the Union had lost majority support, Thayer stated that in "July, maybe the latter part of June . . . I . . . started getting the vibrations that that was the case. I don't believe that they [i.e., the vibrations] were totally confirmed until the latter part of July or early August . . . . [I]t is something that continued with the frustration of the employees over that period of time . . . . I was hearing more and more things from my managers and supervisors as time wore on."

More specifically, Thayer claimed that he received reports "once or twice a week" from his operations manager, Klingaman, that Klingaman had, in turn, heard from "supervisors and warehouse managers and the employees of the Company, that there was a great amount of frustration with the current status of the situation, that the employees were extremely dissatisfied with the representation that 598 had given them during the period of the contract that they were—they no longer wanted Local 598 to represent them."[26]

Similarly, Thayer reported that he learned from Brea Warehouse Manager Tom Skinner during Thayer's weekly visits to the Brea facility during this late July-early August period that in Skinner's "discussions with the employees, that the majority of the employees did not want Local 598 to represent them."[27]

Thayer also reported in a similar vein that the Cerritos warehouse manager, Seldon Stafford, regularly told Thayer:

> . . . that . . . the employees at Cerritos were constantly asking him questions with regard to the status of the Union . . . and that they had registered to him in those discussions a great amount of dissatisfaction with the Union and how they had been represented, and that they, too, and again a majority of them, did not want Local 598 to represent them.[28]

Thayer also testified similarly regarding conversations he had directly with four employees, three of whom—Gramstadt, Wright, and Imoto—assertedly made antiunion statements in the context of their being inter-

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[24] Resp. br., pp. 18 and 21.

[25] E.g., "*I have discussed this with most of the other employees and believe that a majority no longer want Local 598 to represent them.*" (Emphasis supplied.) As some employee signers acknowledged during testimony, this latter statement was simply untrue. (E.g., Czerniewski.) And even employees such as Madding, who affirmed the truthfulness of the latter statement, cannot be credited on this point in the light of the fact that the bargaining unit employees worked at two separate locations and no showing was made which would explain how an employee at one location could have had discussions with enough employees at the other location to justify the statement. It is impossible, moreover, to reconcile Madding's testimony here with her other testimony that she tried to enlist "the other guys" in an antiunion petition effort, but "they didn't seem too interested."

[26] Thayer was least impressive in tacking on the latter "magic words" to his account of Klingaman's second- and third-hand reports about employee attitudes. I utterly disbelieve this much of his testimony—especially where Respondent did not call Klingaman to corroborate Thayer on these points.

[27] Again, especially absent corroborative testimony from Skinner, I do not believe that the "magic words" were uttered by Skinner either.

[28] Stafford was not called as a witness. I do not believe Thayer's attribution to him of "magic words."

viewed by Thayer in connection with their imminent promotion to supervisory positions. The fourth alleged conversation was with one of the Union's stewards, Don Ferguson. In each case, Thayer attributed to those employees statements, *inter alia*, that "a majority" of the employees were "dissatisfied" and "no longer wanted Local 598 to represent them."

Although the first three employees named above were supervisors by the time of the hearing herein, none of them was called to corroborate Thayer. I therefore do not believe Thayer that those persons uttered any "magic words." Ferguson, the steward, was called as a witness, but only by the General Counsel—to rebut Thayer's account. Ferguson expressly denied saying anything approaching the words attributed to him by Thayer and acknowledged only that the most that he had said to Thayer was that employees were "dissatisfied," based on the lengthy stalemate in negotiations. He denied ever hearing from any of the employees that there was any interest in replacing the Union and affirmatively stated, "[T]hey never said that they wanted to disavow themselves from Local 598. This is one thing they did not do." I credit Ferguson.

From the foregoing, it is evident, and I find, that, while Thayer may have received generalized reports from his managers and supervisors that employees were "dissatisfied" with the lack of progress in the bargaining for a new contract (and with the Union's failure to break the deadlock), Thayer did not receive from those sources any reliable information amounting to an objective indication that more than half of the unit employees had reached the point of wishing to be rid of the Union as their exclusive bargaining agent. Moreover, the general character of the reports which Thayer claimed to have received from those sources did not permit him to know the context in which alleged antiunion sentiments may have been voiced by employees. And, as I discuss next, even if I were to credit fully Thayer's claim that his supervisors and managers used the "magic words" in making their reports to him, such reports, absent more, are not adequate to rebut the presumption of an incumbent union's continuing majority status.

Struksnes, supra, makes clear that even the most systematic polling of employees, one-by-one, about their desire for union representation is unlawful and, *ipso facto*, the results are insufficient to ground a "good faith doubt," unless certain affirmative safeguards are built into the polling procedure. It would be incongruous, therefore, for reports such as those described by Thayer to be given legitimacy as a basis for an employer's refusal to recognize an incumbent union where the context in which employee sentiments were allegedly expressed to supervisors is never made a matter of record by the employer—the party in possession of those facts and having the burden of establishing its defense. Thus, where Respondent chose to call neither the supervisors having first-hand knowledge regarding the specifics of the asserted antiunion views of the unit employees, nor to call the employees themselves, Thayer's testimony may not only be viewed with disbelief, as I have done, but it is inadequate as a matter of law to meet Respondent's "heavy" rebuttal burden. *Pennco, Inc., supra; Cornell of California*, 577 F.2d at 516–517.[29]

These latter considerations arguably do not apply to the three conversations which Thayer held with the soon-to-be supervisors, Gramstadt, Wright, and Imoto. Thus, if Thayer were credited fully about his reports of those conversations, it might be concluded that those employees volunteered their personal antiunion feelings and their opinions as to the antiunion sentiments of the other employees in a noncoercive context. But the personal sentiments expressed by those then-employees did not reflect any more than that 3 employees in a unit of at least 21[30] no longer wished union representation. And their alleged statements that a "majority" of their fellow employees shared their views are plainly insufficient to amount to "objective" factors which would justify a good-faith doubt. *Cornell of California*, 577 F.2d at 516–517.[31] Accordingly, even if Thayer told the truth about his conversations with those employees, the information which he thus gleaned was inadequate in law to privilege his later refusal to recognize the Union.

For all of those reasons, I conclude that Respondent failed to meet its burden of showing that there were objective considerations based on which it did entertain, or could have entertained, a good-faith doubt of the Union's majority status when it admittedly refused to deal further with the Union on and after August 27. Respondent therefore violated Section 8(a)(5) and (1) of the Act.

IV. ALLEGED UNILATERAL CHANGE IN SHIFT SCHEDULES AT BREA

The previously expired labor agreement contemplated the establishment of a swing shift. Thus, article X of that expired agreement states:

> SWING AND GRAVEYARD SHIFTS
>
> An employer may establish a regular swing shift consisting of eight (8) consecutive hours (exclusive of a meal period of one-half (1/2) hour) starting between 3:00 p.m. and 6:00 p.m., Monday through Friday. Straight time rates of pay for work on such swing shift shall be seventeen cents (17¢) per hour higher than the rates provided in the Wage Schedule attached hereto.

Consistent with this provision, there had been a swing shift at the Brea facility for an unstated period of time before September 8 which ran between 4:30 p.m. and 1

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[29] Moreover, any other approach would only invite resort to mischievous shortcuts by employers and would discourage their use of the preferred poll techniques sanctioned by *Struksnes, supra*. See *Pioneer Inn Associates* v. *N.L.R.B.*, 578 F.2d 835, 840 (9th Cir. 1979).

[30] Respondent never adequately established the precise number of employees in the unit at critical stages. Thayer conceded, and the RM petition likewise concedes, that the unit complement may have been as large as 27 or 28 during relevant periods. It is unnecessary to determine whether even the latter figures are accurate in the light of my disposition of the "good faith doubt" issue.

[31] I note moreover the utter absence in this record of any evidence of independent employee actions, such as resignations from union membership, which might have lent some substance to the conclusionary reports which Thayer claimed to have received that a majority of employees wished to be rid of the Union. *Ibid.*

a.m. In the bargaining for a new labor agreement, neither party had proposed any changes in article X.

The parties stipulated that Respondent changed the scheduled hours of its swing shift at the Brea facility on September 8. The post-September 8 swing shift schedule was from 10:30 a.m. to 7 p.m. on the same day. Concurrent with this change, the day-shift schedule was changed from 8 a.m. to 4:30 p.m. to 7 a.m. to 3:30 p.m. As a consequence, what had been previously consecutive shifts became substantially overlapping shifts.[32]

The General Counsel, relying on the Supreme Court's decision in *Jewel Tea*,[33] argues that the scheduling of work shift hours is a mandatory subject of bargaining within the intendment of Section 8(d) of the Act, that Respondent's drastically altered shift arrangements necessarily and predictably had an adverse impact on the unit, and that Respondent therefore violated its duty to bargain in good faith by failing to notify the Union in advance of its intentions and to offer to bargain about the change.

Respondent defends on the related grounds that the Union had *de facto* notice of Respondent's intention to change the shift schedules (through a communication by the Union's shop steward, Benegas, to Union Official Stephens on or about September 1 reflecting Benegas' awareness of the intended swing shift schedule change) and that the Union failed to request bargaining about the intended change, thus waiving its rights to bargain.

I deal with this issue summarily: It is plain that starting and stopping times of a work shift are mandatory bargaining subjects within the meaning of Section 8(d) of the Act. *Jewel Tea*, 381 U.S. at 691, and cases cited. The only questions are whether the Union had advance notice of the shift schedule change; and, if so, whether the Union's failure to request bargaining with Respondent over the change amounted to a waiver of the right to bargain over it.

As to whether the Union had notice of the change, I find as follows: In a pretrial affidavit given to the Board, Union Agent Stephens stated:

> About the first of September, 1980, Pete Benegas, an employee and steward at Brea, told me *they were talking about starting a swing shift* from 10:30 a.m. to 7:00 p.m. at Brea only. A week and one-half later, employees at Brea told me this had been done. [Emphasis supplied.]

On the witness stand, Stephens disavowed this statement and claimed that he had only received a report from Benegas about the shift change after it had already taken place. Respondent argues that Benegas may be treated as the Union's agent for purposes of receiving communications from Respondent about changes in conditions which are mandatory bargaining subjects; and further argues that Stephens' admission in his affidavit that Benegas transmitted the message to him shows in any case that the Union was on notice of the shift schedule change before it occured and that it therefore waived the right to bargain by failing to initiate a request to Respondent to negotiate over the subject.

I reject Respondent's position. Assuming, without deciding, that Respondent could discharge its duty of notification by informing a shop-level steward of its intentions, and assuming further that Stephens' version as reflected in his affidavit is more reliable than his contrary testimony at the hearing, I conclude that the evidence relied on by Respondent is inadequate to show that either Benegas or the Union's higher echelon representatives received any reliable notice *from Respondent* about a specific shift schedule change. Thus, from Stephens' version in his affidavit it is simply unclear to whom Benegas was referring in saying that "they were talking about" the change. Since I deem it to have been Respondent's burden, as the party with the best information as to how, if at all, a communication was made to the Union about the change, to show that notice was actually transmitted, and since Respondent came forward with no additional evidence on the subject, I find that the Union did not, in fact, receive any reliable communication sufficient to trigger an obligation on its part to demand bargaining over the intended change.

The Board has held, with court approval, that a union's waiver of the right to bargain over a mandatory subject will not be lightly inferred, but, rather, the evidence of waiver must be "clear and unmistakable." See, e.g., *Timken Roller Bearing Co.*, 138 NLRB 15 (1962), enfd. 325 F.2d 746 (6th Cir. 1963), cert. denied 376 U.S. 971. The vague report communicated to Stephens by Benegas as reflected in Stephens' affidavit, coupled with the Union's subsequent inaction, is not "clear and unmistakable" evidence of an intention to waive statutory bargaining rights.

Independent of the foregoing—and certainly taken together with it—by the time the Union received whatever information it did on the subject of the shift schedule change, Respondent had already taken the position that it would no longer bargain with the Union due to a professed doubt about the Union's representative status. Under these circumstances, it would have been a futility for the Union to request bargaining over the intended shift schedule change even if the Benegas communication were deemed in more ordinary circumstances sufficient to trigger an obligation on the Union's part to make the next move. *Transmarine Navigation Corporation*, 152 NLRB 998, 1004 (1965).

Accordingly, for either or both of the reasons discussed above, the Union did not waive its right to bargain over the shift schedule change at the Brea facility; and Respondent's unilateral imposition of that change constituted an independent violation of Section 8(a)(5) of the Act.

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[32] Assuming that Respondent continued its practice established under the expired labor agreement of paying a 17-cent-per-hour premium to swing shift employees (a matter about which the record is silent), the change would have the necessary effect that employees working overlapping hours would receive different pay rates for the same job tasks performed at the same time, depending on whether they were on the "day" or "swing" schedule.

[33] *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO* v. *Jewel Tea Co., Inc.*, 381 U.S. 676 (1965).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, including on and after August 27, 1980, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the following-described unit, an appropriate one for collective-bargaining purposes:[34]

> All production and maintenance employees, warehouse employees, including shipping and receiving clerks, [and] janitors, employed by Respondent at its Anaheim and Brea facilities;[35] excluding office employees, professional employees, and supervisors as defined in the Act.

4. By refusing on and after August 27, 1980, to recognize and to bargain further with the Union over the terms for a collective-bargaining agreement to replace one which had expired earlier, and by thereafter unilaterally changing the established day and swing shift schedules at its Brea facility,[36] and by each of those actions, Respondent has failed and refused to bargain collectively in good faith with the Union and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act.

5. By the actions of Supervisor Gramstadt in questioning employee Madding in the third week of August 1980 about her own feelings about the Union and those of her fellow employees and by soliciting Madding to circulate a decertification petition, and by the actions of other supervisors identified above in soliciting employees to sign a management-prepared antiunion form letter on August 26, 1980, and thereafter, and by the independent actions of Supervisors Gramstadt and Ives in coercing employees in connection with that management solicitation effort, and by each of said acts, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. Prior to August 27, 1980, the Union and Respondent had not reached full agreement on the terms of a collective-bargaining agreement to replace an earlier one which had expired, and, accordingly, Respondent has not reneged on any commitment to enter into any particular replacement agreement.

THE REMEDY

Having found that Respondent violated the Act as set forth above, I shall recommend that Respondent cease and desist therefrom, and from violations of the Act in any other manner or by any other means,[37] and that it take affirmative remedial action as follows: Restore the *status quo ante* its unilateral day and swing shift schedule changes on September 8, 1980, and maintain the schedules prevailing immediately before they were thus changed unless and until Respondent has discharged its obligation to notify the Union about, and, upon the Union's request, to bargain collectively in good faith over, any changes in those schedules;[38] and post a remedial notice to its employees.

Upon the foregoing and upon the entire record, I issue this recommended:

ORDER[39]

The Respondent, Wagner Distribution Services, Inc. d/b/a Distribution Services West, Anaheim, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to recognize the Union as the exclusive collective-bargaining agent of employees in the unit, and failing and refusing to bargain in good faith with the Union over any and all mandatory subjects of bargaining affecting the unit, including the terms and conditions for a collective-bargaining agreement to replace an earlier one which expired, and any intended changes in established wages, hours of work, or other terms and conditions of employment.

(b) Interfering with, restraining, or coercing its employees in the exercise of their rights under the Act by questioning them about their own union sympathies or those of their fellow employees, soliciting them to circulate antiunion petitions, or otherwise sponsoring antiunion conduct by employees by soliciting them to sign management-prepared antiunion forms, or by promising them benefits or by creating the impression that employees' union or antiunion activities are under management surveillance.

(c) In any other manner or by any other means interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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[34] Hereafter the unit. The unit description is in accordance with the allegation in the complaint, as amended at the hearing, which Respondent amended its answer to admit.

[35] The record reflects that after the events which were the subject of the complaint Respondent opened an additional facility. Whether or not employees at that facility are appropriately included in the existing unit was not litigated. Accordingly, no findings or conclusions are entered as to that question.

[36] Although the complaint attacked only the unilateral change in the swing shift at the Brea facility, the record undisputedly reveals that the day shift schedule was likewise changed in connection with the wholly revised swing shift schedule. Because both matters were fully litigated and because they were essentially interwined actions, I address both such actions in my conclusions, as well as in my recommended remedy and in my recommended Order, below.

[37] Respondent's unfair labor practices were widespread and pervasive, especially to the extent that they were calculatedly directed at the elimination of an established collective-bargaining relationship, and, accordingly, a "broad" remedial Order is warranted. Cf. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[38] In the absence of any evidence that employees suffered actual financial losses as a consequence of Respondent's unlawful unilateral changes, I have omitted from my recommended remedy any "make whole" provision.

[39] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act:

(a) Immediately recognize the Union and bargain collectively in good faith with it over any and all mandatory subjects of bargaining affecting employees in the unit.

(b) Rescind the September 8, 1980, changes in day and swing shift schedules at its Brea facility and restore and maintain the schedules prevailing there immediately before said date unless and until Respondent discharges its statutory duty to notify and, upon request, to bargain in good faith with the Union over any proposed changes in those schedules.

(c) Post at its facilities in Orange County, California, copies of the attached notice marked "Appendix."[40] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply with it.

[40] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."